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INTRODUCTION

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Addressing myself to some of the aspirations in this Symposium for a lawyer-centered jurisprudence gave me an uneasy sense not indeed of *autrefois vu,* nor indeed of *autrefois pensé,* but at least of *autrefois rêvé.* "Jurisprudence" (including the name of it) has always been a mystery, shimmering or murky according to standpoint, both to the professional neophyte and to the layman. And for the layman, of course, this mystery is piled on top of the preexisting mystery of law itself.

One of the present writer's activities of the last twenty-five years has been that of a week by week radio commentator on international relations. I remember becoming rather gratified from time to time with the listener response as manifest in public debate and private "fan mail." I also became rather wearied, before many years at all, by one kind of question which kept recurring in the fan mail. Letters usually began something like this: "Dear Professor: My husband and I agreed (or disagreed) absolutely with your talk on the radio last night." They usually ended something like this: "At any rate, we are glad to say that we understood everything except the way you were introduced. The announcer said you were a 'Professor of International Law and Jurisprudence.' We've got an idea what International Law is. But What, Oh What, is Jurisprudence?"

So when, after a while, I got utterly weary with giving miniature private lectures in letters of reply to individual listeners on what "Jurisprudence" might be, I finally gave notice that at my next regular broadcast I would devote two and a half minutes to answering this question once and for all. And what I said in that next broadcast was rather like this:

> If you see someone who is doing things to law or writing or saying things which operate on the rules or apparatus of the law, you're looking at a lawyer! If you see someone who is writing or saying things about the things that lawyers are doing or writing or saying to operate on the rules or apparatus of the law, you're looking at a jurist! But when you finally (if more rarely) see someone who is also saying or writing

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> things about what jurists are writing or saying about what lawyers are doing or writing or saying to operate on the rules or apparatus of the law, then, lo! and behold! you're looking at a jurisprudent!

Of course, the appropriation of such names is a matter of customary usage at a particular time and place, and such distinctions have no prescriptive force to bind any particular speaker. In particular, both this intermediate position of "the jurist" and his relation to "the lawyer" and "the jurisprudent," are debatable. There are certainly other American usages (fostered by others as well as journalists) whereby "a jurist" means a lawyer who attends a public dinner (or other public occasion), or a lawyer to whose opinion you want to give credence, or a lawyer who knows his business, or a lawyer who has a modicum of ability, or simply a lawyer seen through careless or mystified layman's eyes.

When we have discounted such euphemisms, and allowed for the debate as to what role is left for the "jurist" today as a separate type, one thing at any rate is clear. This is that lawyers' activities have already for a long time been a main (if not *the* main) focus of concern of jurisprudence, though at the one or two more or less rarefying removes of which my radio miniature spoke. No one familiar with the range of jurisprudential literature of the present century will doubt, for example, that the activities of certain lawyers, especially of the judges, have long been a main concern of jurisprudence, at each of the levels mentioned. We need only to think, in this regard, of the work of Holmes, Pound, Cardozo, Llewellyn, Jerome Frank and scores of others in the United States; of Kantorowicz, Heck and the other *Interessenjurisprudenten* of Germany, or of Francois Gény, Duguit and others in France; or any of almost all significant present writings on the decisions of the Supreme Court of the United States.

Our Editors, in announcing the subject of this Symposium, and our contributors in what it has conveyed to them, have certainly entertained no narrowing focus. We may understand its central question as concerned with the possibility or potentiality of a "lawyer-oriented" jurisprudence, and interpret this as arising from a view of "lawyers," as either *the object of jurisprudential study* or the group whose concerns set its directions. It would then indicate an orientation of this Symposium as wide as the legal order and all the values this should subserve. If we see this question as arising from a view of the lawyer (in our Editors' words) as "an emerging force in modern jurisprudence," then the field of force actually or potentially polarised around him is no less wide, though not necessarily congruent. And, on which-

ever formulation, it is clear that, for all the contributors, orientation to the lawyer (and to the world into which he must emerge) would be an orientation not to an autonomous world of law, with its technical precepts and institutions, but rather to the wide-open world of the social order and the pertinent knowledge of it with all the achievements, shortcomings, potentialities, and limits which affect this. The orientation of the lawyer's "emergence," all the contributors seem variously to be saying, must be an emergence outward, an *extra*-version from his present concerns.

Nor is any of this really surprising. Those who planned and made this Symposium (for which the present writer can claim no credit), and those who now read it, must obviously be aware that "lawyers" cannot, without gross mutiliation of what remains, be abstracted from "law." Historically, indeed, amid all the indecisive debates of the historical jurists and the anthropologists, the best mark for identifying "law" as a differentiated social control, separately from religious belief, mores and the like, is the appearance of specialised law interpreters and appliers. And these have in turn to be identified by their use of certain techniques of arguing and of differentiating between and extending cases, which have been associated with "lawyers." What is thus true historically may, indeed, also largely still be true analytically. Hermann Kantorowicz, one of the great pioneers of continental sociological jurisprudence, still had to fix, in his *ultima verba,* on such a professional class of interpreters as the decisive mark in his "Definition of Law." H. L. A. Hart's "rules of recognition," basic to his concept of law, have at their operational center the class of lawsayers, the authenticity of whose lawsaying must (within the given legal order) be taken as datum. And this is no less central a position of Karl Llewellyn's final and *magnum opus, The Common Law Tradition.*

It may be objected to all this that the central role of lawyers in both traditional and modern thinking about law is really not pertinent to the subject of the present Symposium, since the stress of this is not on lawyers as opposed to farmers, or to entertainers and the rest. This stress (objectors may say) is on practising attorneys as opposed to judges, law teachers, administrators, public servants (whatever "legal" background or duties these others may have), as well as to farmers, entertainers and the rest. If we can make this distinction at the present time (as we no doubt can), we would still be faced with the fact that jurisprudential concern with this group, whether as a direct object of study or as a class whose concerns and operations are the object of study, is of long standing. The Roman jurisconsults were neither judges nor judicial administrators, nor salaried public servants, nor university teachers, and the counseling of clients was

for them as much as for the veriest modern office lawyer, a day-to-day task. With varying direction and depth as the centuries went by, the relation of the roles, skills, tasks, outlooks, achievements and failures of the jurisconsults to the vicissitudes of the Roman law has been a millenial concern of jurisprudence.

Are we to say that the Roman jurisconsults were not practising lawyers merely because (as is true) they were men of wide outlook and high vision, as well as technical skills? To do so would be to characterise our contemporary lawyers not by what they do but by their shortcomings in the doing of it. Are we to say that the Roman jurisconsults were not lawyers, because there were not enough of them, certainly nothing like the hundreds of thousands who somehow sustain themselves in the United States? To do so would be to recognize "lawyers" only by the spawning of them. Certainly we should hesitate to say that the Roman jurisconsults cannot be regarded as lawyers merely because they enjoyed too high a community respect and esteem for the service which they rendered. For, however stoically we admit the contemporary lawyer's unfavorable public image, it would be outrageous to say that this is the lawyer's final and decisive attribute. Nor is it easy to accept the view that the Roman jurisconsults cannot be regarded as lawyers, just because no monetary fees were paid for their services. Fee-consciousness is, no doubt, a prominent component in the contemporary lawyer's public image, and perhaps even in this lawyer's image of other lawyers. Yet it would still be unjust and even extraordinary to take this as a basis for saying that the Roman jurisconsults are not to be regarded as lawyers in the contemporary sense. Certainly it would be very startling to think that our Editors and contributors consider the present venture (which some of them at least regard as breaking new ground) to be focused on the lawyer as a fee-receiving rather than a service-giving actor.

The good reader, therefore, should approach this collection on guard against suggestions from any quarter that its concern with lawyers' roles and lawyers' preoccupations is breaking wholly new jurisprudential ground. Such a suggestion (if made) would either be simply untrue; or the meaning of the term "jurisprudence" in it would have been arbitrarily restricted; or the term "lawyers" would have been arbitrarily given a restricted meaning; or more than one of these. I suspect that it may be rewarding for the reader to proceed on the hypothesis that any of these liberties may occasionally be found in one or another of these contributions.

The subject of this Symposium, whatever it precisely be, has a built-in tendency to dramatisation. A cynic, for example, might regard the very notion of somehow wedding the concerns of "jurisprudence" with those of the "lawyer" as filled with something of the entertainment

value of suddenly mating an anchorite with a woman of easy virtue. Such a cynic's implicit vision of "jurisprudence" is likely to be as of a web of thought fine-spun by impractical theorists in innocence of the world and its realities, and in especial ignorance of human passion, avarice, corruption and inertia and the mundane and sordid human environment. The cynic's implicit vision of the "lawyer" is likely to contain admixtures of the ambulance-chaser, the exploiter à la Bleak House of estates and litigants, the "fixer" of tickets, the lackey of the corporate giant and the hoodwinker of juries. Some of the dramatic import of enterprises like the present may also spring from the mere idea that, without them, "jurisprudence" and "lawyers" would (like anchorites and women of easy virtue) not get together. For even when cynicism is absent, this pulling together of "jurisprudence" and "lawyers" holds promise as a spectacle for many who persist in seeing "theory" and "practice" of law as mutually insulated spheres. For them "jurisprudence" is concerned only with theory, and is ignorant and disdainful of practice; and "lawyers" are concerned only with practice and ignorant and scornful of theory. And even those who do not indulge such naivetés in general may still be very interested in efforts to reestablish contacts between jurisprudential exponents of theory and the legal practitioners, for they are well aware of many points where uneven and uncoordinated movements in each threaten or destroy communication between these spheres.

It is on some such basis as this last that Thomas Cowan offers his model of inquiry by a kind of dialogue or *pas de deux* between practitioners and jurisprudents. This might serve simultaneously (he thinks) to ascertain the assumptions and beliefs of today's practitioners concerning the law and their actual tasks and aspirations within it. It would sensitize them to the potentials of tasks and aspirations for developing and transforming the legal order and the lawyer's role in it. Not the least value of what he has to say is to point out that knowledge of this side of practitioners' outlooks is so limited that we may not even know with what questions a real dialogue could begin. So that an inquirer should be ready and even eager to find that practitioners, who are supposed to be the *object* of the inquiry, may turn out to be the *de facto* guides and directors of it. Thomas Cowan thinks it possible that the practitioner may himself be modified by his own attempts to understand and articulate the questions that need asking. So that if we think of this Symposium (as he obviously does) as geared to the issue whether the lawyer is "an emerging force in jurisprudence," Cowan would think it not beyond possibility that any practitioners involved may, before the inquiry is over, become more of an "emerging force" than they were

before it began. Such "clinical" investigation, in short, may leave both the inquirers and the objects of their inquiry different from what they were before. And part of the answer about the "emergence" of lawyers as a "jurisprudential force" may have to be sought in the degree and direction of such movements.

For Iredell Jenkins, on the other hand, the target-lawyers of the inquiry are not just those of our own times, but all the generations of lawyers. For him the question whether lawyers are an "emergent force in jurisprudence" turns in our own times into a challenge to transform the actual situation of today's lawyers. In previous centuries of common law growth (he thinks) the intellectual, social and moral traditions which moulded and supported the structure of the law, and therefore the roles which minister to law, were (as it were) given. Law "operated within an intellectual, moral, and social order that was antecedent to and independent of it and that controlled its operations." It did not have to determine what values it should promote, for it inherited the substance of all this from the established order, the accepted moral code, the church, the vested interests and customs. Its initiative in defining or changing the patterns of society was thus very limited. So that generally, Professor Jenkins thinks, the lawyer of the past reflected the living law, while the theoretician expounded the natural law; and between them they embodied the positive law.

All this illustrated, Professor Jenkins believes, the truth that practice and theory, when these are doing their jobs well, are coordinate and inextricable moments in a unitary process, in which each fills in the *lacunae* left by the other. And the basic, (and, he insists), the literally mortal disease affecting the ability of today's legal profession to continue to fill its pristine role is the wild and uncontrolled (and therefore "cancerous") growth of legal doctrine, which is a joy to law publishers, but to no one else. The resulting threat to the health of the law is threefold—the growth goes on independently both of its source in actual life and its goal of a better life. It becomes inert. And it distorts and even blocks the mutual access between theory and practice. Iredell Jenkins' earnest consequential analysis and proposals are directed towards a series of adjustments in the realm of study of values ("the ideal"), of the actual social interests and forces at work, and the restructuring of the law itself. All this has radical implications for legal education, and not least for the case method of teaching; and the reader will no doubt tend to assess, by his reaction to these proposals, the value of the analysis which precedes them.

The contrast of theories and practice in the legal profession is also central to understanding of the problems raised by Walter Probert and Louis M. Brown. Judges and practising attorneys (they

suggest) talk and possibly mean alike; and professors and law students talk alike. Law students as potential attorneys of course tend to blur this line of division; professors in jurisprudential and other "cultural" law subjects also blur the line at still other points. But basically (from this standpoint) the importance of judges and practising attorneys to jurisprudence is that it is only from *their* postures, and *their* "lawyering" activities, that the law can be perceived in the dynamic cultural realities of its operation and movements. Even the American realists (these authors think) failed to grasp this point. "Rules tended to disappear as they watched, yet inside the process they [rules] are still clearly visible." So too, the area of relations which academic lawyers are now categorizing in connection with lawyer-counseling as "non-official-lawmaking" are not viewed by the lawyers who act primarily from *this* aspect. It is an important jurisprudential question, these writers insist, to understand the approach of the law-actors themselves to conflicts which lawyer activity succeeds somehow in resolving, even when from academic lawyers' points of view the conflicts are simply irreconcilable. For knowledge of the ways of lawyers, quite apart from its use in inducting law students into practice, may often provide a new general perspective on the social problems faced and handled by lawyers. Not the least important parts of this new perspective would present the lawyer's role as part of the interplay of official decisions and private activities; and it might also make jurisprudence into better sense to those who actually work with the stuff of the law.

Harold Lasswell and Myres McDougal have succinctly restated, for the purposes of the present Symposium, the blueprint for a contextual and policy-oriented jurisprudence inspired by the values clustered around "human dignity," elaborated and refined by them since their seminal statement on legal education a generation ago. Rather differently from most other contributors, they are concerned to display the jurisprudential wares already (as it were) available on the market for illuminating "the daily lives of judges, advocates, administrators and legislators," rather than to press for jurisprudential concern to interpret more deeply the actual postures and activities of lawyers. This is confident therapeutic perspective, in which the jurisprudence offered is a body of knowledge about law already designed and in being to remedy the shortcomings, inadequacies and confusions of all who are concerned with law. Most actors on the legal scene, from law professors and law students, through administrators, draftsmen, judges, and legislators, not to speak of international lawyers, have had this healing message beamed towards them. And the beam as here relayed is indeed stated broadly enough to catch them all. But the point is also here clearly implied that the

legal profession, if it is to become a force for human progress in the contemporary world, must recognize and take its place in the "public order of human dignity" within which the lawyer operates.

"What lawyers must do to be saved!," is even more overtly the message of Arthur S. Miller's provocatively titled "Public Law and the Obsolescence of the Lawyer." In an age when public law is all-pervasive, he thinks, lawyers still are private-law-oriented; in the era of the "administrative state" they still think that courts are central; and after Freud they still cling to the ideas of the Age of Enlightenment. These and other deficiencies of lawyers have been made manifest, the author thinks, by their failure to meet the challenge of such developments as the vast growth of public law, the merger of law into the political process, and the growth of more rational management techniques in decision-making in "the administrative state." So that if the Lasswell-McDougal essay might have been subtitled, "The Lawyers' Road to a Public Order Based on Human Dignity!," Professor Miller's and Professor Jenkins' articles might be entitled, or subentitled, "Why This Lawyers' Road is Closed!"

If we were to dub Lee Loevinger's article in similar mood, we might perhaps give it the subtitle "What Can Lawyer-Orientation Do To Save Jurisprudence?" His answer is emphatic. In his view only an updating of law and jurisprudence from the age of dialectics to the age of empirics can save jurisprudence. Both dialectic method in law and empiric method in science are merely, of course, means of gathering and organizing data. The resistance of lawyers to the extension of empirical methods (for instance to those of jurimetrics, of which the author is so devoted and distinguished a leader) is a clue (he thinks) to their centrally pathological fear. And he believes that this fear is itself of the stuff of fantasy, born as much out of ignorance of science as it is out of concern for the law. In the result Loevinger sees a great hiatus in law, the lack of an institutional means of conducting empiric research and of collecting, reporting and collating the results for consideration by decision-makers. On this assessment of the plight of both law and jurisprudence, "the addition of a 'lawyer-oriented' label to the ruminative rationalizations of jurisprudence is not going to do any more to make it productive than any of the old labels such as 'historical,' 'natural law,' 'analytical,' 'sociological' or 'realistic.' " What law needs, he thinks, is not a "lawyer-oriented jurisprudence" but a "socially oriented jurimetrics." Both of the two great systems of gathering data, the empiric as well as the dialectic, must contribute to the solution of its complex and proliferating problems.

Of the rich cluster of questions to which the Editors' intentions gave rise in the minds of the various contributors, Charles D. Kelso

addressed himself to two main ones. What can study of the behaviour and needs of practising lawyers contribute to knowledge about law — that is, to "jurisprudence"? Are not the problems which practising lawyers consider to be important worthy of jurisprudential study? His answer, stated as almost self-evident, is that since lawyers create and administer the legal system, and advise with respect to it, they and their activity should certainly not remain the most neglected study of jurisprudence. Lawyers' functions and the levels of performance of them, the need for new kinds of lawyers (for instance capable of working in harness with non-lawyer specialists), for new kinds of service institutions (for instance for fact-gathering), or for para-legal personnel (like the "technicians" of the medical or dental practitioner) all need to be assessed. Such assessments may be vital to guide future action in the legislative, administrative, and legal educational spheres. More knowledge on all these matters could bring new insights to law teachers as to the relation of theory to practice, and to law students as to why "theory" is "practical." The very search for such knowledge might have drastic effects on the directions of concern of law schools, and their forms of organization. Yet, of course, these tasks of leavening the study of law with knowledge about lawyers, will not be well performed by taking short cuts, such as merely handing over teaching to practitioner-teachers, or merely reshuffling existing teaching and research personnel and resources, or by any wholesale flight from specialisms, or by the downgrading of values pursued in the law to the level of the client-hungry lawyer, rather than of justice-hungry servants and subjects of an ongoing legal order.

There are, no doubt, other notable themes which will emerge for the avid reader from the earnest self-searchings of the contributors to this issue. But those which come nearest to mutual coherence would probably have to be stated in a doubly pointed question, adapted from St. Paul to the contemporary plight of the lawyers. "When the trumpet faltereth, who will gird himself for the battle?" And (with no less pertinence): "When the trumpet faltereth, who precisely is it who should cut the cackle?"